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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN
MUTUAL LIABILITY INSURANCE COMPANY, IN
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U. S. DEPARTMENT OF LABOR, AND
MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF
BETHLEHEM STEEL CORPORATION
IN SUPPORT OF PETITIONERS'
ARGUMENTS SEEKING REVERSAL

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INTERESTS OF AMICUS CURIAE

Bethlehem Steel Corporation¹ employed over two million maritime workers in the eleven shipyards it owned and operated throughout the periods during which most of the nation's asbestos-related disease cases arose. Pursuant to the requirements of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, *et seq.* ("LHWCA" or "Act"), Bethlehem has either provided benefits to or faces claims to benefits from thousands of workers and dependents who also seek or have recovered substantial sums from companies who manufactured the asbestos-containing products once commonly used throughout this nation's shipyards.

If the Fifth Circuit's decision is affirmed, Bethlehem and all other maritime employers will lose both the statutory right to credit third-party recoveries against benefits payable pursuant to the LHWCA and the protections against inadequate civil settlements that Sections 33(f) and (g), 33 U.S.C. Section 933(f), (g), were specifically crafted to provide. The financial impact upon maritime employers of a ruling permitting workers and their families to retain both civil recoveries and full compensation benefits will be immense.

Bethlehem Steel Corporation believes that its participation in this proceeding will bring to the attention of the Court relevant information not otherwise available to it.

¹ Pursuant to Rule 29.1, Bethlehem Steel Corporation states that it has issued shares to the public but that none of its parent or subsidiary companies has done so.

The first of the issues to be reviewed involves the conflicting opinions of the Fifth and Ninth Circuit Courts of Appeal. Bethlehem was the successful respondent/cross-petitioner in *Cretan v. Bethlehem Steel Corporation*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), the decision directly at odds with that now under review. Bethlehem's participation in that proceeding permits it to bring to this Court's attention the information necessary to an understanding of the Ninth Circuit's reasoning and a fuller appreciation of the flaws in the Fifth Circuit's rejection of the *only* interpretation consistent with Congress' intent.

Bethlehem's arguments support those of Petitioners and seek reversal of *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs (Yates)*, 65 F.3d 460 (5th Cir. 1995).

SUMMARY OF ARGUMENT

The Ninth Circuit recognized that this Court's conclusion in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), that the phrase "person entitled to compensation" *must* be given identical interpretations in both the crediting and forfeiture sections of the LHWCA would create a situation entirely at odds with Congress' goals if the interpretation adopted by the Fifth Circuit were accepted. If not "persons entitled to compensation," individuals such as the two surviving Cretans and Ms. Yates will be able to retain both full compensation and all civil recoveries, precisely the outcome Section 33(f) exists to preclude.

Their employers will lose all protections which Section 33(g) was created to provide against inadequate settlements.

In *Cretan*, the Director, Office of Workers' Compensation Programs, openly acknowledged that these results would thwart Congress' plans and purposes.

Here again, the Director agrees generally with the perception on which Bethlehem relies: that the underlying general purpose and plan of § 33(f)-(g) apply to all proceeds of claimants' causes of action for compensable injuries or deaths, regardless of how (with or without instituting proceedings) or when (before or after the cause of action or the entitlement to compensation has arisen, accrued, vested, or been recognized in a formal order) the tortfeasor is ordered or agrees to pay those proceeds.

Cretan, Brief for Respondent Director, OWCP, p. 29.

Forced to choose between a construction that would obstruct Congress' goals and one that would not, the Ninth Circuit concluded that there was "little sense in a distinction that turns on whether the death for which settlement is made has yet to occur" and, returning to its analysis in *Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, at 984 (9th Cir. 1991), concluded that "the entitlement does not have to have become vested at the time the settlement is made."

'The only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur.' *Force*, 938 F.2d at 984 (quoting Director's Brief).

Cretan, 1 F.3d at 847.

ARGUMENT

Sections 33(f) and (g) must be read together.² Each contains the "person entitled to compensation" phrase which this Court has ruled must be given the same meaning in each statutory section. Both have a common purpose: protection of employers' interests. Section 33(g) exists to protect the employer "against his employee's accepting too little for his cause of action against a third party." *Cowart*, 505 U.S. at 483 (quoting *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968)). Section 33(f) prevents double recoveries by assuring protection of the employer's "inviolable" right to recover paid LHWCA benefits. See *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). Together, Sections 33(f) and (g) frame a "brutally direct" and "unmistakable scheme" which permits "no exceptions." *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 647 (5th Cir. 1986).

The legislative history proves that Congress intended that there be no exceptions to the scope of Sections 33(f) and (g). The LHWCA was enacted in 1927. Act of Mar. 4, 1927, Ch. 509, 44 Stat. 1424. It initially required a "person entitled to compensation" to elect between accepting compensation and seeking damages from a third party. § 33(a), 44 Stat. 1440. Acceptance of compensation resulted in an automatic assignment of the claimant's rights against the third party to the employer. § 33(b), 44 Stat. 1440.

² The Fifth Circuit may have been led astray by the fact that *Ingalls'* entitlement to a credit for pre-death settlements pursuant to Section 33(f) was not an issue presented to it. *Yates*, 65 F.3d at 465, n.3.

Any "person entitled to compensation" electing to sue a third party retained the right to be paid compensation by the employer in excess of the third-party recovery. § 33(f), 44 Stat. 1441. However, if the "person entitled to compensation" compromised the third-party action for less than the compensation due, the employer remained liable for further benefits "only if such compromise [was] made with his written approval." § 33(g), 44 Stat. 1441.

In 1959, Congress abolished the requirement that an LHWCA claimant elect between receiving compensation and pursuing a claim against a third party. Public Law No. 86-171, 73 Stat. 391 (1959).³ The 1959 amendment was designed to relieve hardships faced by injured employees whose need to meet immediate expenses led them to accept compensation rather than pursue an uncertain third-party recovery. S. Rep. No. 428, 86th Cong. 1st Sess. 2 (1959).

In 1972, the LHWCA was extensively amended. Public Law No. 92-576, 86 Stat. 1251. One of the provisions amended Section 33(g) to overrule decisions that had applied an estoppel theory to prevent employers from relying on the approval requirement in some situations. § 15(h), 86 Stat. 1262. In rejecting those holdings, the committee reports explained that the "amendment makes it clear precisely what written approval the person entitled to benefits must obtain and file with the deputy commissioner." S. Rep. No. 1125, 92nd Cong. 2d Sess. 14

³ The election requirement had been previously limited to cases in which compensation was actually being paid pursuant to an award by a deputy commissioner. Act of June 25, 1938, Ch. 685, §§ 12, 13, 52 Stat. 1168.

(1972); H.R. Rep. No. 1441, 92nd Cong. 2d Sess. 12 (1972). In short, the 1972 amendment to Section 33(g) was clearly intended to *strengthen* the requirement of employer approval of settlements for less than the amount of LHWCA liability.

Despite the demonstrated intent of the 1972 amendments to strengthen the approval requirement, the Benefits Review Board ruled that approval was not required when a claimant was not receiving benefits under the Act at the time of settlement. *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980). In response, the issue received renewed Congressional focus during the process leading to the 1984 amendments.

The first version of changes to Section 33(g)(2) proposed following *O'Leary* appeared in H.R. 7610, Section 21(c),⁴ and was described by its sponsor, Representative Erlenborn, as intended

[T]o preserve the employer's compensation lien on amounts received from a third party, whether the employee either enters into a secret settlement with the third party or fails to notify the employer of a third-party award.

House Hearings, *supra*, at 56. Even after hearing the Chairman of the Benefits Review Board express his concern that the increased focus upon employer rights could

⁴ H.R. 7610 appears in *Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor* ("House Hearings"), 96th Cong. 1st Sess. (1979), at 43-44.

"lead to injustice" and following consideration of an organized labor proposal that claimants be permitted to settle without employer authorization whenever the employer refused to pay benefits,⁵ the Senate Subcommittee further *tightened* the original proposal to assure forfeiture of

[A]ll entitlement to compensation and other benefits otherwise available under this Act whenever a third-party action is resolved without the employers' formal written approval.

S. Rep. No. 498, 97th Cong. 2d Sess. 44 (1982).⁶

S. 1182 died in the House. In 1983, the language providing greater protections to employers was incorporated in renewed proposals. Similar language was included in the House proposal in 1984. *See* 129 Cong. Rec. 16,248, 16,251 (1983); 130 Cong. Rec. 8317, 8321, 8515 (1984). The House Report explained that the changes to Section 33(g) were needed to assure that

[I]f a claimant who has brought a cause of action against a third party enters into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore

⁵ *Longshore and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong. 1st Sess. 209-211, 396.

⁶ The changes to H.R. 7610 worked by S. 1182 included placing medical benefits in the category of those subject to forfeiture and relocating the "regardless" phrase to assure that it clearly applied to both "notice" and "written approval" failures. S. 1182 appears at 128 Cong. Rec. 18,023 (1982).

Act, the employer shall be responsible for additional compensation only if the employer has approved the settlement agreement.

H.R. Rep. No. 570, 98th Cong. 1st Sess. Pt. 1, at 30-31 (1983).

The history leaves little room for doubt. Congress *did* intend to create a "brutally direct" scheme which admitted no exceptions. Congress had learned that nothing less would work. The legislative history forced the Director's concession that

[T]he underlying general purpose and plan of § 33(f)-(g) apply to all proceeds of claimants' causes of action for compensable injuries or deaths, regardless of how (with or without instituting proceedings) or when (before or after the cause of action or the entitlement to compensation has arisen, accrued, vested, or been recognized in a formal order) the tortfeasor is ordered or agrees to pay those proceeds.

Cretan, Brief for Respondent Director, OWCP, p. 29. Despite this concession, the Director argued to the Ninth Circuit that *Cowart's* "vesting language" foreclosed implementation of Congress' acknowledged goal.

It was because of that response, the demonstrated Congressional intent which it confirmed, and its own recognition that its paramount duty was to give effect to – *not* thwart – Congress' choice of the appropriate policies, that the Ninth Circuit ruled as it did.

The Ninth Circuit was absolutely correct when it concluded that *Cowart* did not mandate a decision wholly at odds with Congress' choices. The Fifth Circuit's focus

upon the *timing* of the settlements led it to overlook the *effect* that Congress had directed be given to them.

CONCLUSION

The Fifth Circuit's decision cannot stand scrutiny. It thwarts Congress' clearly expressed purposes and violates what this Court has recognized is the employer's "inviolable right" to the protections Sections 33(f) and (g) were crafted to provide. The decision should be reversed.

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Respectfully submitted,

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